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2014 IL App (3d) 120401-U

Order filed February 5, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 9th Judicial Circuit,
)	Knox County, Illinois
Plaintiff-Appellee,)	
)	
v.)	Appeal No. 3-12-0401
)	Circuit No. 11-CF-382
JOSHUA D. SUNDBERG,)	
)	Honorable James B. Stewart,
Defendant-Appellant.)	and Honorable Scott Shipplett,
)	Judges Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Lytton and Justice Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not improperly rely on facts not in evidence in finding defendant guilty of the offense of aggravated battery with a knife, a deadly weapon. Defendant was not denied his due process rights, after defendant was convicted and sentenced to DOC, when the court decided defendant's motion for new trial and a motion to reconsider sentence as argued by defense counsel in defendant's absence.
- ¶ 2 The State filed an information charging defendant Joshua D. Sundberg with one count of

aggravated battery alleging, on August 24, 2011, defendant, “in committing a battery, * * * and by use of a deadly weapon, being a knife, knowingly caused bodily harm to Jarred C. Fox, in that he cut Jarred C. Fox on the face.” Defendant and the victim, Fox, both testified at the bench trial and the court admitted hospital records and photographs regarding Fox’s injuries without objection. At the close of the trial, the trial judge determined Fox’s version of events was more credible than defendant’s version of the events and the nature of the photographs of the wound was consistent with the victim’s testimony that defendant cut him with a knife. On appeal, defendant contends the trial judge improperly denied his motion for new trial because the court relied on facts not in evidence during his trial. Defendant also argues he is entitled a new hearing on his motion for a new trial because the record does not demonstrate defendant waived his right to be present at the hearing. We affirm.

¶ 3

BACKGROUND

¶ 4 On August 29, 2011, the State filed an information charging defendant with one count of aggravated battery, a Class 3 felony with the possibility of extended term sentencing. The information stated that, on August 24, 2011, defendant, “in committing a battery, * * * and by use of a deadly weapon, being a knife, knowingly caused bodily harm to Jarred C. Fox, in that he cut Jarred C. Fox on the face, in violation of 720 ILCS 5/12-4(b)(1).” The court appointed a public defender to represent defendant and, after defendant waived his right to a jury trial, the court set the matter for a bench trial.

¶ 5 Judge James B. Stewart held the bench trial on November 2, 2011. During the State’s case-in-chief, Jarred Fox testified that, on August 24, 2011, defendant called Fox’s cell phone and told Fox he intended to “kick [his] ass.” Fox testified he had known defendant as a friend

for approximately two and a half years and was not aware of any dispute or disagreement with defendant.

¶ 6 Shortly after the phone call, Fox was walking near an apartment building when he first observed defendant seated in the front passenger seat of a nearby truck. Fox testified that defendant exited the truck, pulled a knife out of his waistband, and quickly approached Fox. Fox stated defendant appeared angry, as he approached, but Fox could not understand what defendant was saying to him. Fox described the knife as a “bowing [Bowie] knife” with a wide blade about six inches long.

¶ 7 Fox said he tried to reason with defendant and discuss why defendant was mad at him, but defendant continued to “come at him,” as Fox started walking backwards trying to get his own pocketknife out of his pocket. Fox said, “[T]he next thing I know he swings and hits me.” Fox testified that defendant took one swing at him with the same hand that was holding the knife, and defendant connected with Fox’s face. Fox said he saw blood coming from his face and realized that defendant cut his face with the knife.

¶ 8 Since defendant approached Fox very quickly, Fox said he did not have the opportunity to pull his own knife out of his pocket during this altercation. Fox said a lot of people were around at the time and a mutual friend, Calvin Hainline, grabbed defendant and “coaxed” defendant back into the truck, and the driver drove away.

¶ 9 Fox said his injury consisted of a “deep gash just [a] millimeter away from the main artery that can cause death and blindness.” Fox explained he received approximately 11 stitches at the hospital. Fox showed the trial judge the scar that remained from the injury.

¶ 10 During cross examination, Fox said he did not remember the exact words exchanged

because, “One, I was drinking throughout the day. Two, I’m confused as to what’s going on.”

Fox then identified photos, State’s Exhibit Nos. 2 and 3, which depicted Fox’s injury to his face.

¶ 11 The court granted the State’s request to admit a certified copy of Fox’s hospital records into evidence, State’s Exhibit No. 1, without objection from the defense. The State then rested its case-in-chief.

¶ 12 Defendant, the only defense witness, testified he lived in the apartment building where the altercation occurred on August 24, 2011. Defendant stated, shortly before the altercation with Fox, defendant just finished a phone conversation with Fox. Defendant denied threatening Fox during this phone conversation. According to defendant, Fox told defendant he wanted his money back “or else.” Defendant stated Fox was already walking up the driveway when defendant exited the pickup truck. Defendant testified he did not have a knife in his hand when he approached, and defendant swung his fist at Fox because Fox told defendant Fox was going to kick his ass if defendant did not have the money to repay the loan to Fox. Defendant testified he felt threatened by Fox’s actions which was why he took a swing at him. After defendant hit Fox, defendant said Fox had a knife in his hand when he removed his hand from his pocket.

¶ 13 Defendant testified he did not call the police after the altercation with Fox because it was just “a simple fight,” where defendant felt threatened and defended himself. Defendant also admitted he had been convicted of two felonies within the past 10 years, one in 2007 and one in 2009.

¶ 14 During cross-examination, defendant explained Fox loaned him \$15 for groceries a few days earlier. Defendant testified Fox’s injury was caused by defendant’s fist striking the sharp bone on the side of Fox’s face. Defendant said his own knife remained in the sheath on his right

hip during the entire incident and defendant did not remove it during the altercation with Fox. The defense then rested.

¶ 15 The State recalled Fox who stated he did not loan defendant any money prior to the altercation. Fox testified that he had no idea why defendant was so angry with him on August 24, 2011.

¶ 16 At the close of the case and following arguments, Judge Stewart found that the case turned “on the issue of credibility.” The court determined Fox’s version of events made more sense and rejected defendant’s contention of self-defense. The court further found that it did not need an expert to testify about the cause of the injury because, looking at the photos, it was “a clean cut” that “appears to be a knife cut, not a split by – by a fist and it’s a deep one and it’s a straight line.” Judge Stewart found defendant guilty and set the matter for a sentencing hearing.

¶ 17 In January 2012, Judge Scott Shipplett was assigned to preside over defendant’s case. During the sentencing hearing, conducted on March 7, 2012, Judge Shipplett found defendant caused serious injury to Fox and had a significant criminal history. Additionally, the court found defendant was on parole when the altercation occurred and the sentence was necessary to deter others from committing similar acts. The court noted that defendant had only been released from prison and his halfway house for less than three months prior to this incident. The court also found, since 1993, defendant had committed 9 prior felonies, 11 or 12 prior misdemeanors, and 7 prior traffic offenses and determined that defendant should not be placed on probation. Based on defendant’s background, the court sentenced defendant to six years commitment to the Illinois Department of Corrections (DOC), with credit for 190 days already served in jail, and payment of court costs. The court also admonished defendant about his right to appeal.

¶ 18 On April 2, 2012, defendant filed a “Motion to Reconsider Sentence,” asking the court to reconsider its sentence and place defendant on probation. Additionally, at the same time, defendant filed a “Motion for New Trial” on grounds that the court erred in finding defendant guilty beyond a reasonable doubt. On April 18, 2012, Judge Shipplett heard the pending motions. Defendant did not appear with his attorney on that date. Defense counsel stated he discussed the posttrial motions with defendant while at the sentencing hearing, and defendant said he did not want to be returned to court for this hearing. The court accepted defense counsel’s waiver of his client’s presence at the hearings on the posttrial motions.

¶ 19 After arguments, Judge Shipplett denied both the motion for new trial and the motion to reconsider defendant’s sentence. After a brief discussion off the record, on his own motion, Judge Shipplett determined Judge Stewart should hear and decide the motion for new trial. Judge Shipplett vacated his order denying the motion for new trial and rescheduled a motion hearing before Judge Stewart.

¶ 20 On May 11, 2012, Judge Stewart held the hearing on defendant’s motion for new trial. At the hearing, the State and defense counsel were both present, but defendant did not appear. Defendant’s attorney represented to the court that defendant told his attorney that he wanted to waive his presence at the hearings on this motion. Defense counsel stated he had contact with defendant by mail, prior to this hearing before Judge Stewart, explaining that the court set a hearing this motion for a new trial.

¶ 21 Defense counsel said defendant did not want to appear and asked his attorney to raise the issue that Fox seemed to be intoxicated at the time of the incident and the police did not recover a knife from defendant. Further, defendant wanted the court to consider that Fox’s testimony

regarding his own pocket knife changed during the course of his testimony and there were inconsistencies in Fox's testimony. Most importantly, defense counsel argued there was no medical evidence to support Fox's testimony that his injury was caused by a knife rather than defendant's fist. Defense counsel argued, during this hearing, that defendant testified he acted in self-defense and defendant's ring may have caused the cut when defendant struck Fox with his fist.¹ Without medical or expert testimony, the defense contended that the trial court erred in finding Fox's injury was caused by a knife based on Fox's testimony and the photographs.

¶ 22 At the close of this hearing, the court found, in addition to medical records and the photographs, Fox testified that the defendant swung at Fox with a knife and, according to the judge, Fox said "it was a knife that slashed his face." The court also noted that the photographs depicted a "bad cut." Therefore, based on the evidence, the court denied defendant's motion for a new trial holding that the State proved Fox had been "slashed with a knife."

¶ 23 Defendant filed a timely notice of appeal.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant first argues the trial judge erred by denying his motion for new trial because the court relied on facts not in evidence during trial regarding the cause of the injury. Next, defendant contends he is entitled to a new hearing on his motion for new trial because the record fails to show a valid waiver of defendant's right to be present at the hearing before Judge Stewart.

¶ 26 The State claims the court found defendant guilty based only on the evidence presented

¹ Upon review of the trial transcripts, defendant did not present any evidence or argument during the bench trial regarding wearing a ring on his finger when he struck Fox.

during trial and a fair assessment of the credibility of witnesses based on that evidence.

Additionally, the State submits defendant's presence at the posttrial motion hearing was not required in this instance.

¶ 27 In defendant's motion for new trial, defendant claimed the trial judge erroneously found him guilty of aggravated battery with a knife, a deadly weapon, since the State did not present evidence by a medical expert that the cut on Fox's face was, indeed, caused by a knife or blade. On appeal, defendant does not suggest the evidence failed to establish guilt beyond a reasonable doubt requiring an acquittal, rather, he alleges on appeal that a new trial is required because the judge's conclusions, based on his observation of the photograph of Fox's injury, were unsupported by the evidence due to the absence of expert testimony and, therefore, denied defendant of his due process rights.

¶ 28 It is well-established "[a] determination made by the trial judge based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence[,] constitutes a denial of due process of law." *People v. Dameron*, 196 Ill. 2d 156, 171-72 (2001). We review this legal issue *de novo*. *Id.* at 171.

¶ 29 Defendant relies on this court's holding in *People v. White*, 183 Ill. App. 3d 838 (1989), for the proposition that error occurs when the trial court goes beyond the boundaries of the record and bases its ultimate findings on its own speculative determinations. In *White*, during a hearing on a petition to revoke probation, the facts involved whether the victim's cut on his wrist was caused by the victim falling onto glass from a broken bottle or defendant's use of a knife on the victim's wrist. *Id.* at 839-40. The trial court, in *White*, observed photographs of the victim's

injury and found that a knife caused the victim's laceration, rather than a piece of broken glass, without the benefit of testimony from an expert or other facts in the record to support that conclusion. *Id.* at 840. This court held, in *White*, the ability to examine a cut and determine the instrument that made the cut is beyond the province of common knowledge, and the trial judge spent a significant part of his analysis of the evidence on the distinction between broken glass and knife cuts, and reversed the court's ruling on the defendant's petition to revoke probation and remanded the case for a new hearing. *Id.* at 841.

¶ 30 The State argues *White* is distinguishable from this case. We agree. In *White*, several witnesses testified to different versions of what occurred during an incident that resulted the victim's wrist being cut. Although the victim stated the defendant cut his wrist with a knife while sitting in a vehicle, the evidence was undisputed that there was a further altercation that occurred outside of the vehicle immediately thereafter, involving additional parties and glass bottles being thrown at each other and shattering on the pavement. *White*, 183 Ill. App. 3d at 839-40. There also was some evidence that defendant fell onto the broken glass outside of the vehicle and the victim yelled that he was cut after he was outside of the vehicle. *Id.* This court, in *White*, held that the trial judge "spent a significant part of his analysis of the evidence on the distinction between glass and knife cuts," which exceeded the common knowledge the trier of fact. *Id.* at 841.

¶ 31 In the case at bar, Fox testified that he clearly saw a knife in defendant's hand when defendant approached Fox. Fox described the object as a "bowing [Bowie] knife" with a wide six-inch blade. Fox also stated that defendant swung his hand holding the knife at Fox's face, hit Fox on the side of his face, and the bleeding started immediately following this blow. Fox

testified that he required approximately eleven stitches to close the wound. The court had an opportunity to observe the scar on Fox's face. Additionally, the court admitted Fox's medical records into evidence, without objection. Those medical records included the following statement: "[Patient] reports that he was attacked by someone he knew and thought to be a friend, [patient] was cut by a knife on the left temporal area and also reports being punched in the left lower jaw."

¶ 32 In contrast, defendant agreed he struck Fox with his fist, but denied striking him with a knife. In fact, defendant testified, as he approached Fox, defendant felt threatened by Fox's actions and took a swing at Fox in self-defense. According to defendant's testimony at trial, only after defendant hit Fox with his fist alone, Fox responded by removing a knife from Fox's own pocket. Thus, defendant agreed a knife was present but was in the victim's hand following the first exchange of blows.

¶ 33 We note that defendant argued, in his motion for new trial, that he may have caused the injury to Fox with a ring defendant was wearing on his hand during the fight. However, during trial, the transcripts show the trial court did not receive evidence that defendant was wearing a ring at all.

¶ 34 Any determination regarding the credibility of the witnesses and the weight given their testimony is within the province of the trier of fact. *People v. Collins*, 106 Ill. 2d 237, 261-62 (1985). On review, we will not reassess the witnesses' credibility or reweigh their testimony and evidence. *People v. Williams*, 332 Ill. App. 3d 693, 697 (2002).

¶ 35 This case turned on the credibility of the two testifying witnesses, Fox and defendant. Fox stated defendant held the knife during the fight causing his injury. On the other hand,

defendant testified he did not take his knife out of its sheath during the altercation, but saw Fox remove a knife from his own pocket after the men exchanged the initial blows. Thus, the court was called upon to determine which witness was more credible. The trial judge found Fox to be more credible than defendant, after noting the nature of the cut was consistent with the victim's account that defendant was holding a knife in the hand that stuck Fox in face. We conclude that the trial judge did not rely on facts not admitted as evidence or rely on facts outside the province of his common knowledge when making credibility determinations that resulted in a finding of defendant's guilt. Therefore, the trial court did not commit error by denying the motion for new trial on this basis.

¶ 36 Defendant next argues he is entitled to a new hearing on his motion for new trial because he was denied his right to be present at a critical stage of his trial. We review *de novo* whether defendant's constitutional right to be present at a critical stage of his trial has been violated. *People v. O'Quinn*, 339 Ill. App. 3d 347, 358 (2003).

¶ 37 It is well-settled that a criminal defendant has a general right to be present at every stage of his trial. *People v. Lofton*, 194 Ill. 2d 40, 66 (2000); U.S. Const., amend. XIV, § 1; Ill. Const. 1970, art. I, § 8. Both the federal constitution and the Illinois Constitution afford criminal defendants the general right to be present, not only at the trial, but at all critical stages of the proceedings. *O'Quinn*, 339 Ill. App. 3d at 358 (citing *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *People v. Bull*, 185 Ill. 2d 179, 201 (1998)). However, the right to be present is not an absolute, inviolable right and a defendant is not denied a constitutional right every time he is not present during his trial, but only when his absence results in him being denied a fair and just trial. *Lofton*, 194 Ill. 2d at 67; *People v. Bean*, 137 Ill. 2d 65, 83-84 (1990).

¶ 38 Our supreme court has held the privilege of being present in court is not guaranteed “when presence would be useless, or the benefit but a shadow,” but due process clearly requires that a defendant be allowed to be present if his absence would prevent a fair and just hearing. *Lofton*, 194 Ill. 2d at 67. Additionally, our supreme court has held, “The nearly unanimous rule in this country is that the defendant's constitutional right to be present at the trial does not embrace a right also to be present at the argument of motions prior to trial or subsequent to verdict.” *Lofton*, 194 Ill. 2d at 66 (citing *People v. Woods*, 27 Ill. 2d 393, 395 (1963)).

¶ 39 In the case at bar, defendant was present in court during his bench trial and sentencing hearing, and was only absent from the hearings, subsequent to the verdict, on his motions for new trial and to reconsider sentencing. The motions simply addressed alleged errors that occurred during the bench trial, where defendant was present and assisted in his defense.

¶ 40 Finally, the only additional new evidence defense counsel raised in the motion for new trial contended that defendant was wearing a ring at the time of the altercation and the ring gashed Fox’s face. The State argues this fact did not fall under the definition of “newly discovered evidence” for purposes of a posttrial or postconviction motion. We agree. It is well-established that evidence is not deemed newly discovered if “ ‘it presents facts already known to the defendant at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative.’ ” *People v. Coleman*, 381 Ill. App. 3d 561, 568 (2008) (quoting *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007)). Clearly, defendant would have known and should have presented the fact that he was wearing a ring on the fist that struck Fox, and should have argued the ring may have caused the injury during the initial bench trial, and not for the first time in a motion for new trial.

¶ 41 After careful review of the record, we conclude that the posttrial hearings on defendant's motion for new trial and motion to reconsider sentence did not involve defendant's substantial or constitutionally protected rights. Therefore, his presence was not required at the hearings on those motions to assure defendant a fair and just hearing or to protect defendant's due process rights.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 44 Affirmed.